

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

LEROY OLIVER RUDDOCK,

Civil No. 10-246 (JRT/FLN)

Petitioner,

v.

DAN HILLERAN, Warden,

**ORDER REJECTING IN PART AND
ADOPTING IN PART REPORT AND
RECOMMENDATION OF THE
MAGISTRATE JUDGE**

Respondent.

Leroy Oliver Ruddock, Prisoner No. 226121, MCF Moose Lake, 1000 Lakeshore Drive, Moose Lake, MN 55767, petitioner *pro se*.

Todd P. Zettler, Assistant Scott County Attorney, **SCOTT COUNTY ATTORNEY'S OFFICE**, 200 Fourth Avenue West, Shakopee, MN 55379, for respondent.

This matter is before the Court on petitioner Leroy Ruddock's response to a Report and Recommendation filed by United States Magistrate Judge Franklin L. Noel on February 10, 2010. (Docket No. 5.) In the Report and Recommendation, the Magistrate Judge observed that some of Ruddock's claims were unexhausted, and then directed Ruddock to proceed as follows:

The Court recognizes that a state prisoner who files a mixed habeas petition can elect to abandon his unexhausted claims, and proceed with an amended petition that includes only his fully exhausted claims. If Petitioner intends to exercise that option here, he should file an amended petition that includes only fully exhausted claims, (which presumably would be the prosecutorial misconduct claim presented as Ground One of the current petition), and he should do so before the deadline for filing objections to this Report and Recommendation. If Petitioner does not file such an amended petition before that deadline, it is the Court's recommendation

that Petitioner be deemed to have waived the option to amend, and that the action then be summarily dismissed without prejudice.

(Report and Recommendation at 6, Docket No. 5 (citations omitted).) Therefore, the Magistrate Judge recommended that the “action be summarily DISMISSED WITHOUT PREJUDICE, unless, before the deadline for filing objections to this Report and Recommendation, Petitioner files an amended habeas corpus petition listing only his fully exhausted claim(s).” (*Id.* at 7.)

On February 23, 2010, Ruddock timely filed an amended habeas corpus petition. (Docket No. 10.) Accordingly, the Court rejects the Magistrate Judge’s Report and Recommendation, to the extent it recommends that the action be summarily dismissed without prejudice, adopts the Report and Recommendation, to the extent it recommends that Ruddock be allowed to file an amended petition, and refers the amended petition to the Magistrate Judge for further consideration.

ORDER

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. The Magistrate Judge’s Report and Recommendation dated February 10, 2010 [Docket No. 5] is **REJECTED in part and ADOPTED in part**;
2. The Court **REFERS** the matter to the Magistrate Judge for further consideration.

DATED: March 24, 2010
at Minneapolis, Minnesota.

s/John R. Tunheim
JOHN R. TUNHEIM
United States District Judge